APPELLATE COURT

OF THE

STATE OF CONNECTICUT

A.C. 42602

MERIBEAR PRODUCTIONS, INC. d/b/a MERIDITH BAER and ASSOCIATES

V.

JOAN FRANK, ET AL.

BRIEF OF DEFENDANTS-APPELLANTS WITH SEPARATE APPENDIX

TO BE ARGUED BY:

MICHAEL S. TAYLOR

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STATEMENT OF ISSUES

1. Did the lower court err in concluding that California's exercise of jurisdiction over defendant George A. Frank was proper where the evidence demonstrated that the defendant had no contacts with California, but the trial court nevertheless found that he had sufficient minimum contacts because he signed a credit card authorization in Connecticut facilitating a single payment to the California based plaintiff?

2. Did the trial court wrongly conclude that a sale of goods and services that would be governed by the Home Solicitation Sales Act is not so governed where the buyer intends to use the goods or services as an aid in facilitating the sale of a home and the Act excludes transactions "pertaining to the sale or rental of real property"?

3. Did the trial court err in entering a damage award in favor of the plaintiff that both improperly awarded double damages and awarded damages not recoverable for the breach of contract claim made by the plaintiff?

TABLE OF AUTHORITIES

INTRODUCTION

The jurisdictional "minimum contacts" rule is intended to protect a defendant who is sued in a foreign state, by ensuring constitutional due process minimums of fair play and substantial justice in every case. Here, the trial court found that defendant George A. Frank had sufficient minimum contacts to warrant jurisdiction in California, even though the evidence demonstrated that he had *no* contacts with California. He signed a credit card authorization in Connecticut, for work to be done in Connecticut by a California based company. That is not a sufficient basis for California to exercise jurisdiction, and fair play and substantial justice are not furthered by allowing it to do so.

Separately, the Home Solicitation Sales Act ("HSSA"), General Statutes §§ 42-134a, et seq., is a broadly worded consumer protection statute, originally designed to shield residential consumers from certain abuses inherent in the door-to-door sales business. The HSSA applies to the residential sale of "consumer goods or services." The lower court agreed, and the parties did not dispute, that the HSSA would apply to bar enforcement of the contract in this case, but for the application of an exclusion to the HSSA for transactions "pertaining to the sale or rental of real property." Neither this Court nor the Supreme Court (prior to this case) has ever construed this language.

Defendants contend that the "sale or rental of real property" means just what the language says: contracts for the transfer – by sale or rental – of real property. Because real property is not "consumer goods or services" (and is not susceptible to door-to-door sales in any event), such transactions fall outside the scope of the Act. Plaintiff argues for a much broader construction, and would apply the exclusion to any contract for the sale of actual goods or services (rather than real estate) that otherwise would fall squarely within the scope of the HSSA, if the purchaser intends to use the goods or services to facilitate the sale of a home. Because the HSSA does not suggest that intended use is a relevant consideration, and because plaintiff's construction would result in inconsistent and arbitrary application of

the HSSA – depending on the evidence of intent – defendants' construction more closely meets the purposes of the HSSA, and plaintiff's overly-broad approach should be rejected.

STATEMENT OF FACTS AND NATURE OF PROCEEDINGS

I. Facts

The contract at the center of this dispute is a "Staging Services and Lease Agreement" ("Agreement") entered into on March 13, 2011 by plaintiff Meribear Productions, Inc. d/b/a Meridith Baer and Associates ("Meribear") and defendant Joan E. Frank.[1] Defendant George A. Frank (Joan's husband, frequently referred to at trial and in various documents as "Andy" Frank) did not sign the Agreement and the trial court found that he was not a party to it. (Memorandum of Decision, 10/14/14 ("MOD") at 2; A48).[2] He instead signed only a Credit Card Authorization ("Authorization") in which he agreed to pay a single, $19,000 initial charge for the services provided by Meribear. (A119).

The Agreement indicated that Meribear would provide design and decorating services, including the delivery, installation and rental of furniture, antiques, art, rugs, plants, etc., at the defendants' home in Westport, CT. There is no dispute that the purpose of these "staging" services was to spruce up the home, with temporary furniture, art, plants and other items owned by Meribear and rented to the Franks, in order to make the home more appealing to potential buyers, as the Franks intended to market the home for sale.

The initial appraisal of the project by Meribear staff, the negotiation of an agreement, and the signing of the contract all took place at the Frank's home in Westport. (Tr. 3/27/13 at 40; Tr. 4/24/13 at 16). Although the Agreement originally contained California choice of law and forum selection provisions, George Frank added the following language before his wife

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[1]A copy of the Agreement was admitted as Exhibit 7 at trial and may be found at page A113 of the appendix to this brief.

[2]The record does not indicate why Joan signed the Agreement and George did not. Joan testified, however, that the house was in her name (Tr. 3/27/13 at 139), which would be a logical reason for her to sign alone.

signed the Agreement: "Since this is a contract for an agreement taking place in the state of Connecticut, Connecticut laws will supercede [sic] those of California." (A117). In addition, before signing the credit card authorization, George crossed out language suggesting that he was authorizing payment for "any obligations that may become due" and language referring to liability for "all balances" and "additional charges that may be incurred." (A119). George testified at trial that his intent in making these changes was to indicate that he would be responsible for the initial $19,000 charge and nothing more. (Tr. 4/24/13 at 3).

The Agreement provides that the initial $19,000 payment would cover the design, delivery and set-up of the furniture and various other items, and the first 4 months of rental. After that initial period, if the items still were required in the home, additional rental fees at $1,900 per month would be charged. (See MOD at 3; A50; see also Agreement at 1-2; A113-114). After the initial 4-month period, the Franks refused to pay any additional rental. Although at trial the parties offered differing accounts of the breakdown of the relationship, it is clear that, by October 15, 2011, Meribear hired a moving crew and attempted to remove the property from the Frank's home. (Tr. 3/27/13 at 109). The Franks refused to allow the movers to enter the home, demanding from Meribear a release of any claims for additional rental payments and a certificate of liability insurance as required by the Agreement. (Tr. 3/27/13 at 109, 117-18; Tr. 4/24/13 at 13-14, 32-34; A114). The record does not reflect that the plaintiff contacted the police or filed any action for repossession in an effort to secure the return of its property.

On February 15, 2012, after its failed attempt to recover the property, Meribear filed an action for breach of contract against the Franks in California. An individual named Alan Jones, who was an employee of Janney & Janney Attorney Service, Inc. in Los Angeles, attempted to make service of the California complaint under the California long-arm statute. Mr. Jones, unable to locate the Franks at their home in Westport, served them by leaving a copy of the complaint with an individual named Pamela Harvey at the offices of Andy Frank Builders, located at 1175 Post Road East, Westport. (Tr. 3/27/13 at 5-9). The Franks did not

respond to the California action and a default judgment was entered against them in California on August 7, 2012, in the amount of $259,746.10. (A121-122).

II. Nature of Proceedings

Meribear commenced the underlying action by filing an application for prejudgment remedy dated October 2, 2012, and then a complaint dated January 11, 2013, seeking enforcement of the California default judgment. In an amended complaint dated March 7, 2013, plaintiff added claims for breach of contract and quantum meruit. The defendants responded, inter alia, by raising special defenses challenging the exercise of personal jurisdiction over them by the California court and alleging that the Agreement was unenforceable because it violated the HSSA.

Following a trial to the court (Tyma, J.), the trial court issued its October 12, 2014 MOD and entered judgment for the plaintiff. Specifically, on count one, seeking enforcement of the California default judgment, the court found that Joan Frank was not properly served and that the judgment, therefore, could not be enforced against her. (MOD at 10-11, A57-58). In a footnote, the court found that George Frank was properly served (a point which is not in dispute) and that he had sufficient minimum contacts with California (a point that is certainly disputed), based on his endorsement at his home in Connecticut of the Authorization to pay California-based Meribear. (MOD at 11-12 n4; A58-59). The court then entered judgment against George for $259,746.10, the amount of the California default judgment.

On count two, for breach of the Agreement, the trial court found that Joan breached the contract by failing to pay additional rental and refusing to allow Meribear to remove the furniture from the home. The court rejected the claim that the Agreement was unenforceable because it violated the HSSA, holding that the HSSA did not apply because the Agreement "pertains to the defendants' sale of their real property ..." (MOD at 14; A61). The court also rejected the defendants' claim that plaintiff failed to mitigate its damages. Accepting the plaintiff's 2011 inventory list as proof of its present damages, the court awarded $283,106.45 against Joan on count two. The court did not consider the quantum meruit claims in count

three. Following the denial of motions for reargument and reconsideration, defendants filed a timely appeal on December 18, 2014.

On appeal, defendants argued that George Frank did not have sufficient minimum contacts with California to warrant California's exercise of personal jurisdiction over him, that the Agreement was in any event not enforceable in Connecticut because it did not meet the requirements of the HSSA, and that the trial court not only awarded double damages, but also erroneously awarded conversion damages, for the full value of the furniture, rather than contract damages for the rental amounts that would have been due had the contract not been breached.

The Appellate Court affirmed the trial court's judgment. *Meribear v. Frank et al.,* 165 Conn.App. 305, 310 (2016). The Supreme Court then granted certification, as follows:

> Did the Appellate Court correctly determine that the trial court properly determined
>
> (1) that the foreign judgment against George Frank was enforceable after concluding that he had minimum contacts with California that warranted the exercise of its jurisdiction,
>
> (2) that the contract signed by Joan Frank was enforceable notwithstanding the provisions of the Home Solicitation Sales Act; and
>
> (3) that an award of double damages to the plaintiff was appropriate.

Meribear Productions, Inc. v. Frank, 322 Conn. 903 (2016).

During oral argument in the Supreme Court, that Court raised for the first time a question concerning whether the original appeal had been taken from a final judgment. After ordering the parties to file supplemental briefs on the final judgment issue, the Supreme Court issued a decision finding that the appeal had not been taken from a final judgment, because the trial court had not rendered judgment on counts two or three with respect to George Frank. *Meribear Productions, Inc. v. Frank,* 328 Conn 709 (2018). The Court ordered that the case be remanded to the Appellate Court with direction to dismiss the defendants' joint appeal. *Meribear,* 328 Conn. at 726.

The case then returned to the trial court, where the plaintiff withdrew counts two and three with respect to George Frank. (A102) . The plaintiff also moved for post judgment interest, which the trial court granted, rendering judgment in a memorandum of decision dated January 31, 2019. (A104). Defendants then filed this timely appeal on February 15, 2019. Plaintiff moved to dismiss, and defendants moved for permission to file a late appeal. The Appellate Court denied the motion to dismiss and granted the motion for permission to file late appeal on June 26, 2019, issuing a formal opinion on October 15, 2019.

ARGUMENT

I. George Frank Did Not Have Minimum Contacts Sufficient to Warrant Suit in California and He Did Not Consent to California's Jurisdiction.

A) Standard of Review

Plenary: See *Ryan v. Cerullo*, 282 Conn. 109, 118 (2007) ("a challenge to the jurisdiction of the court presents a question of law over which our review is plenary"); accord *Bojila v. Shramko*, 80 Conn. App. 508, 515 (2003) ("[t]he interpretation of a statute, as well as its applicability to a given set of facts and circumstances, involves a question of law, and our review, therefore, is plenary"), citing *Wallingford v. Dept. of Public Health*, 262 Conn. 758, 773 (2003); see also *Shisler v. Sanfer Sports Cars, Inc.*, 146 Cal. App. 4th 1254, 1259 (2006) (where "the jurisdictional facts are undisputed, the question of jurisdiction is a purely legal question and, therefore, is subject to de novo review"). Pursuant to California law controlling long arm jurisdiction, "[w]hen the trial court rules after hearing conflicting evidence on a factual issue, [an appellate court] must uphold its factual determinations on appeal if *substantial evidence* supports them. . . . The ultimate question of whether a California court's exercise of jurisdiction is fair and reasonable is a legal determination subject to our independent review on appeal." (Citations omitted; emphasis added.) *In re Auto. Antitrust Cases I & II*, 135 Cal. App. 4th 100, 111 (2005).

B) The Test for Personal Jurisdiction in Cases Challenging the Domestication of a Foreign Judgment

The "full faith and credit clause requires a state court to accord to the judgment of another state the same credit, validity and effect as the state that rendered the judgment would give it." *Packer Plastics, Inc. v. Laundon*, 214 Conn. 52, 56 (1990). Because that "rule includes the proposition that lack of jurisdiction renders a foreign judgment void," a party can "defend against the enforcement of a foreign judgment on the ground that the court that rendered the judgment lacked personal jurisdiction, unless the jurisdictional issue was fully litigated before the rendering court or the defending party waived the right to litigate the issue." *Id.* Moreover, in light of the presumption that the judgment of another state is valid, the party attacking that judgment bears the burden of proving that it is void—not merely voidable. See *J. Corda Const., Inc. v. Zaleski Corp.*, 98 Conn. App. 518, 523 (2006). For that reason, "a debtor who seeks to challenge the validity of a foreign judgment . . . may do so only by raising [c]onstitutionally permissible defenses ... that destroy the full faith and credit obligation owed to a foreign judgment.... Such defenses include lack of personal jurisdiction or lack of due process." (Internal quotation marks omitted.) *Id.*

In Connecticut, ascertaining "whether another state's court properly exercised personal jurisdiction is determined with reference to the law of that state." *Maltas v. Maltas*, 298 Conn. 354, 367 (2010). California's long-arm statute permits its courts to exercise jurisdiction on any basis that complies with all state and federal constitutional imperatives. See *Elkman v. Nat'l States Ins. Co.*, 173 Cal. App. 4th 1305, 1313 (2009), citing Cal. Code Civ. Proc., § 410.10 (A114). "Personal jurisdiction over a nonresident defendant served with process outside the state satisfies constitutional due process requirements if the defendant has such minimum contacts with the state that the assertion of jurisdiction does not violate traditional notions of fair play and substantial justice." *Doe v. Roman Catholic Archbishop of Cashel & Emly*, 177 Cal. App. 4th 209, 216-17 (2009), as modified (Sept. 24, 2009).

To ensure that state long-arm statutes satisfy due process principles, the Supreme Court predicates the proper exercise of jurisdiction on two requirements. First, the non-resident must have sufficient contacts with the forum state. Second, exercising jurisdiction

over the non-resident must not "offend traditional notions of fair play and substantial justice." (Internal quotation marks omitted.) *International Shoe Co. v. Washington, Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945); see *Asahi Metal Indus. Co. v. Superior Court of California, Solano County*, 480 U.S. 102, 108-13 (1987) (conducting analysis of sufficient contacts separately from fair play and substantial justice analysis).

The minimum contacts inquiry, of course, "is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite affiliating circumstances are present." (Internal quotation marks omitted.) *Kulko v. Superior Court of California In & For City & County of San Francisco*, 436 U.S. 84, 92 (1978). Nevertheless, the sufficiency of a non-resident's contacts is generally informed by whether a defendant may be subject either to the forum state's general jurisdiction or to its specific jurisdiction. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984); accord *Elkman v. Nat'l States Ins. Co.*, 173 Cal. App. 4th at 1314. The general jurisdiction inquiry assesses whether the non-resident's activities in the forum state are sufficiently "extensive," "wide-ranging," "substantial," or "continuous and systematic," to warrant constitutionally permissible jurisdiction for all causes of action, while specific jurisdiction involves the "quality and nature of [the non-resident's] activity" in the forum state with respect to the "particular cause of action." (Internal quotation marks omitted.) *Elkman v. Nat'l States Ins. Co.*, 173 Cal. App. 4th at 1314; accord *Cogswell v. Am. Transit Ins. Co.*, 282 Conn. 505, 524-25 (2007).

Even where there is a threshold showing that the minimum contacts prong can be met (which is not the case here), jurisdiction may still be defeated where the defendant advances "a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477 (1985). Indeed, "jurisdictional rules may not be employed in such a way as to make litigation so gravely difficult and inconvenient that a party unfairly is at a severe disadvantage in comparison to his opponent. (Internal quotation marks omitted.) *Id.* at 478.

Thus, courts that have found minimum contacts must still determine whether an exercise of jurisdiction comports with traditional notions of fair play and substantial justice. That determination is informed by the following six considerations: (1) the burden on the defendant, (2) the plaintiff's interest in obtaining convenient and effective relief, (3) the convenience interest of the witnesses, (4) the forum State's interest in adjudicating the dispute, (5) the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and (6) the shared interest of the several States in furthering fundamental substantive social policies. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *Travelers Health Association v. Commonwealth of Va. ex rel. State Corp. Comm'n*, 339 U.S. 643, 648-49 (1950); accord *Archdiocese of Milwaukee v. Superior Court*, 112 Cal. App. 4th 423, 442 (2003).

In this case, the California court exercised jurisdiction over George Frank and entered a default judgment in favor of the plaintiff on the basis of a single credit card transaction that he made – in Connecticut - to authorize payment under a contract to which he was not even a party. The contract was negotiated and executed in Connecticut, regarding chattel that was located in Connecticut and intended for use in Connecticut. As the nature of a default judgment suggests, the parties did not litigate the jurisdictional question in California and there has not been, nor could there be, any argument that George Frank waived his jurisdictional claim. Nor is there evidence of any other contacts between George and California. Despite these circumstances, the trial court concluded that California had sufficient minimum contacts to warrant an exercise of personal jurisdiction over George and concluded, as a result, that the California judgment was enforceable in Connecticut.

C) The Trial Court Improperly Concluded That George Frank Had Sufficient Minimum Contacts with California

First, there is nothing in this record to demonstrate that George Frank has *any* general ties to California whatsoever, let alone sufficiently "extensive," "wide-ranging," "substantial," or "continuous and systematic," contacts sufficient to warrant constitutionally permissible

jurisdiction for all causes of action. *Elkman*, 173 Cal. App. 4th at 1314. To be clear, the record does not indicate that George Frank has ever set foot in California, ever conducted a business transaction in California, ever owned property in California, or ever taken any step to purposefully avail himself of the protection of California's laws. The court below did not make any findings regarding a claim of general jurisdiction and it did not base its decision on that theory. (See generally MOD at 11-12 n.4 ; A58-59).

Instead, the court premised its conclusion that California had jurisdiction over George Frank on the theory of specific jurisdiction, reaching that conclusion on the basis of the following facts: 1) George Frank is not a party to the Agreement. (MOD at 2; A49). 2) George Frank signed the Authorization, in the amount of $19,000, which purported to represent the initial payment under the Agreement between the plaintiff and Joan Frank. *Id.* 3) In authorizing that charge for $19,000, George Frank expressly crossed out the language on the credit card authorization form committing him to be responsible for "any obligations that may become due." *Id.* 4) The Agreement, for which the Authorization was intended to provide payment, specifically referred to staging services for 3 Cooper Lane, Westport, CT. *Id.* at 3. 5) The plaintiff caused various agents in Connecticut to attempt to remove the furnishings from the Connecticut residence. *Id.* 6) The plaintiff's inventory of furnishings remains in the Connecticut home. *Id.* at 4. 7) George Frank was served with process for this action in Connecticut. *Id.* at 11 n.4.

In other words, George Frank signed a single credit card authorization, in Connecticut, and every relevant action the plaintiff took with regard to George Frank was taken in Connecticut. That is it. That is the entire basis of the court's conclusion that California had personal jurisdiction over George Frank: He made a single credit card transaction, limited to a one-time fee of $19,000 with no liability for future debts, to guarantee a contract (to which he was not even a party) regarding the rental of furniture that has been continuously located in Connecticut to stage a Connecticut home. Both common sense and the case law from

California and around the country confirm that the foregoing "contacts" with California were insufficient to permit jurisdiction to attach.

Significantly, the California Supreme Court has previously held that a "guaranty transaction [is] not a sufficient basis on which to sustain personal jurisdiction over the nonresident guarantor." *Sibley v. Superior Court*, 16 Cal. 3d 442, 443 (1976).[3] In reaching that decision, the *Sibley* Court found the following facts dispositive:

> Petitioner was not a party to the MTA partnership agreement and took no part in its negotiation. His only connection with the transaction apparent from the record was as guarantor of the performance of a Georgia corporation. Petitioner signed the guaranty agreement in Florida and delivered it to another defendant, Peter Thun, who then took it to California. As indicated, petitioner is a resident of Florida; he has never been a resident of California, does not own any real or personal property in this state, and does not have any business interests or relations with California except as trustee of a testamentary trust owning property in Cambria, California. Sibley has not been physically present in this state since January 1973, when he was here in connection with a matter unrelated to the transactions before us.

Id. at 445.

There is a striking similarity between *Sibley* and the facts of this case. In both cases, the non-residents were not parties to the primary instrument being contested. Likewise, both parties executed the agreements outside California and never traveled to California in connection with those agreements. While *Sibley* involved a guarantee, the plaintiff here does not even have that, since George Frank authorized only a one-time payment, not any guarantee of future indebtedness. And both non-residents had no other general ties to California to ground a claim of general jurisdiction. In fact, there was evidence that the non-resident in *Sibley* had been in California within three years of the decision and was the trustee of a trust that owned property there; these elements (which were nevertheless insufficient in *Sibley*) do not exist in our case. Because the non-resident in *Sibley* had greater ties to California but the court still found that those ties were insufficient to confer jurisdiction, and

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[3]Defendants do not believe that the one-time credit card payment in this case constitutes a "guarantee" of the Agreement, particularly where George Frank took affirmative steps to delete words of guarantee from the document. Even if this Court disagrees, however, a guarantee should not be sufficient to establish minimum contacts with a foreign jurisdiction.

because *Sibley* remains controlling authority in California, *Sibley* alone is sufficient to demonstrate that the court below erred.

California is not alone, however, in holding that a guaranty transaction is not a sufficient basis on which to sustain personal jurisdiction over a nonresident guarantor. See, e.g., *Labry v. Whitney Nat. Bank*, 8 So. 3d 1239, 1242 (Fla. Dist. Ct. App. 2009) ("the contingent obligation a guaranty represents remains, even in the event of default, a constitutionally inadequate basis for personal jurisdiction"); *Bank of Tokyo-Mitsubishi, Ltd., New York Branch v. Kvaerner a.s.*, 243 A.D.2d 1, 5-6, 671 N.Y.S.2d 905, 908 (1998) ("the mere furnishing of a guaranty by a non-domiciliary on behalf of a foreign corporation does not serve to confer in personam jurisdiction upon our courts"); *F.D.I.C. v. Hiatt*, 117 N.M. 461, 467 (1994) ("we hold that the signing of a guaranty by a nonresident of a debt owed to a New Mexico creditor does not in and of itself constitute a sufficient contact upon which to base in personam jurisdiction over a nonresident"); *Anilas, Inc. v. Kern*, 28 Ohio St. 3d 165, 167, 502 N.E.2d 1025, 1028 (1986) on reh'g, 31 Ohio St. 3d 163, 509 N.E.2d 1267 (1987) (being co-guarantor of lease agreement not alone sufficient to satisfy personal jurisdictional requirements); Cf. *Corbin Russwin, Inc. v. Alexander's Hardware, Inc.*, 147 N.C. App. 722, 725 (2001) (where non-resident's sole contact with North Carolina was mailing to that state approximately four payments on promissory note, contacts found to be insufficient to exercise jurisdiction).

Where a guarantee agreement cannot be enough to confer jurisdiction, it makes little sense that a single credit card authorization – not rising to the level of a guarantee - for a company in another state, without more, could expose the signer to litigation in that state. If that were the rule, consumers across the country would be exposed to litigation, possibly in jurisdictions on the other side of the country, every time they made a credit card purchase. That cannot be the rule. Because George Frank's sole connection to California was a single credit card authorization for a contract regarding chattel located in Connecticut, and

California law does not permit personal jurisdiction to attach under those facts, the California default judgment is void and the trial court erred in holding otherwise.

D) Subjecting George Frank to California's Jurisdiction Would Offend Traditional Notions Of Fair Play

Although the trial court did not offer any substantial analysis of the fair play prong of *International Shoe*, permitting the single credit card transaction at issue in this case to allow the plaintiff to haul George Frank into a California court more than 3,000 miles away would offend traditional notions of fair play.

This is a case in which a California company chose to do business in Connecticut, with Connecticut residents. The plaintiff's furniture was placed in the defendants' Connecticut home (where it remains) by Connecticut agents for the plaintiff. Thus, the majority of the parties and relevant witnesses to the Agreement (and alleged breach thereof), as well as to the credit card authorization made in connection with that Agreement, all are located in Connecticut. The contract (signed by Joan only) and the credit card authorization (signed by George only) were signed in Connecticut, and the Agreement included language added by the defendants that Connecticut law would supersede California law in governing it.

Even though the plaintiff first sought to enforce the Agreement in a California court, the actual litigation of the alleged breach has taken place entirely in Connecticut. Indeed, there can be no doubt that Connecticut could have jurisdiction over all parties, and that it has a substantial interest in regulating contracts formed in its jurisdiction regarding leased furniture within the state — especially where the subject contract is arguably governed by Connecticut law. By contrast, California's connection to this case is limited to its interest in vindicating the rights of the plaintiff, a California company, to a contract that may or may not be governed by California law and that, in any event, requires litigation in Connecticut to be enforced against the Connecticut defendants. In other words, all of the equities that inform the second prong of *International Shoe*—the competing interests of the parties, the convenience of necessary witnesses, the competing interests of the two states with colorable

claims of jurisdiction over the Agreement, and concerns of judicial economy—all support a conclusion that California did not have jurisdiction over George Frank.

II. The Agreement is Governed By The HSSA

A) Standard of Review

Plenary. This issue involves a question of statutory construction, which is a question of law over which this Court's review is plenary. See *Haworth v. Dieffenbach*, 133 Conn. App. 773, 783 (2012).

> When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature.... In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case, including the question of whether the language actually does apply.... In seeking to determine that meaning, General Statutes § 1–2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered....

(Citation omitted.) *Haworth*, 133 Conn. App. at 783, quoting *Bysiewicz v. Dinardo*, 298 Conn. 748, 765 (2010).

B) Argument

General Statutes § 42-134a defines "home solicitation sale" as:

> a sale, lease, or rental of consumer goods or services, whether under single or multiple contracts, in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller. The term "home solicitation sale" does not include a transaction: ... (5) pertaining to the sale or rental of real property ...

General Statutes § 42-135a provides that no agreement in a home solicitation sale shall be effective against the buyer unless the agreement contains a prominent (specifically described) notice of the buyer's right to cancel the agreement and has attached to it two copies of a separate "notice of cancellation." There is no dispute that the Agreement in this case does not comply with the cancellation notice requirements of the HSSA. In fact, the

Agreement contains no cancellation provision at all. There is also no dispute that, other than to suggest that the Agreement is excluded as "pertaining to the sale or rental of real property," neither the plaintiff nor the trial court has suggested that the Agreement did not otherwise meet the definition of an HSSA contract.

Because the Agreement does not meet the requirements for enforceability under the HSSA, the trial court should have entered judgment for the defendants. The court, however, found that the language of the HSSA was unambiguous and that the Agreement was excluded as pertaining to the defendants' sale of their home. Specifically, the court held that an "agreement concerning the staging of a residential home for sale in the real estate marketplace is not a 'home solicitation sale' within the meaning of the Act." (MOD at 14; A61).

A statute is ambiguous if, when read in context, it is susceptible to more than one reasonable interpretation. *Lagueux v. Leonardi*, 148 Conn. App. 234, 240 (2014). In other words, if the text of the statute would permit "more than one likely or plausible meaning," then its meaning is not plain and unambiguous. *Id.*, citing *Commissioner of Public Safety v. Freedom of Information Commission*, 137 Conn. App. 307, 313–14, cert. granted in part on other grounds, 307 Conn. 918–19 (2012). Where a statute is not unambiguous, "we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common-law principles governing the same general subject matter...." *Lagueux*, 148 Conn. App. at 240.

Here, the language of the HSSA reasonably means that contracts for the sale or lease of a home are not included within the scope of the Act, because real property is not "goods or services." In other words, if a realtor shows up at the door, any sale agreement ultimately reached between the realtor and the homeowner need not meet HSSA requirements, though the specific services provided by the realtor might very well be covered by the HSSA. The trial court concluded, to the contrary, that a different construction is reasonable. As construed by the trial court, *any* contract for goods and services, regardless of its subject matter, will be

excluded from the HSSA as "pertaining to the sale or rental of real property" if the goods and services provided under the contract are *used by the homeowner to facilitate a sale.* There are several reasons why this construction should not be adopted.

Defendants have been unable to identify any reported case construing the relevant language or describing its purpose.[4] The legislative history, however, confirms that the legislature intended the construction offered by the defendants.

The language of subsection (5) was not included in the HSSA when it was first adopted in 1967. The relevant language was first introduced in 1976, when the legislature amended the HSSA. While the Connecticut legislative history does not contain a discussion of the "sale or rental" language, it makes clear that the statute was being modified to conform to the Federal Trade Commission regulations governing door-to-door sales on which the HSSA was based. 19 S. Proc., Pt. 3, 1976 Sess., p. 1241, remarks of Senator Louis Ciccarello; (A148). The legislative history of the federal act, in turn, reveals that the intent was to exclude the sale of real property.

In particular, before adding language to the federal act indicating that "[t]he term 'door-to-door sale' does not include a transaction: ... (6) pertaining to the sale or rental of real property...," the federal record includes the following:

> Recommendations were also received that the rule should contain provisions which clearly state that it is not applicable to transactions pertaining to the sale of real property, insurance and securities. These will be considered in the order presented: *Insofar as the sale of real property itself is concerned, neither the Commission nor members of the real estate sales industry believe that such sales would be subject to the rule as land would not fall within the scope of the definition of consumer goods or services.* However, transactions in which a consumer engaged a real estate broker to sell his home or rent and manage his residence during a temporary period of absence may fall within the class of transactions to which the rule would apply.

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[4] Courts in Ohio repeatedly have held that "home solicitation sale" includes home renovation contracts. *See, for example, Garber v. STS Concrete Co., LLC*, 991 N.E.2d 1225 (2013). Ohio does not seem to have addressed the direct question raised in this appeal however.

(Emphasis added.) Federal Register, V. 37, No. 207 p. 22948 – Thursday, October 26, 1972; (A155).

In other words, because real property, unlike personal property, does not constitute "goods and services," the relevant language was added to make clear that transactions for real property were not governed by the act. Even so, transactions that are very closely related to the sale or rental of real estate, including an agreement for broker services, still might fall under the act. The focus, then, is on the nature of the thing being sold rather than the circumstances in which the thing is used. (A broker agreement, for instance, would only ever be used in connection with a sale or rental of real property, but still was thought to be potentially included as an agreement covered under the federal act).

This construction makes sense, and draws a clearly understandable line between what is and is not governed by the HSSA. The trial court's construction – basing the applicability of the Act not on the nature of goods or services sold but on the *use* a homeowner ultimately intends to make of those goods or services – would result in unpredictable and arbitrary results. For example, a homeowner purchasing new windows in order to replace old, cracked ones (under circumstances otherwise falling within the Act) generally would be protected by the HSSA. But the same homeowner purchasing the same windows to replace the same old, cracked windows, with the express intent of making the home more attractive to potential buyers, would not, under the trial court's construction, be afforded the same protection. In each case, the transaction between seller and buyer – which quite clearly is the object of legislative action under the HSSA - is identical, but the application of the statute is wholly disparate. There is nothing to suggest that the legislature intended such a random result.

It is important to remember that the purpose of the HSSA is to protect consumers from unscrupulous practices by door-to-door salesman. A consumer's intent and purpose in purchasing goods and services has nothing to do with whether the individuals selling those things have or have not engaged in abuses in the door-to-door sales process. While it makes sense to exclude real property as not constituting "goods or services," it makes no sense to exclude goods or services because of their intended use. A door-to door salesman is no more or less likely to engage in abuses based on the use to which a customer intends to put the product being sold.

Moreover, it is important to remember that the HSSA, like the Home Improvement Act into which it has been incorporated; see General Statutes § 20-429(e); is remedial legislation "passed for the protection of the public." See *Caulkins v. Petrillo*, 200 Conn. 713, 720 (1986). As a result, it must be construed liberally in favor of those it is intended to protect. See *Dysart Corp. v. Seaboard Sur. Co.*, 240 Conn. 10, 18 (1997) (remedial statutes liberally construed); *Mack Financial Corporation v. Crossley*, 209 Conn. 163, 166 (1988) (consumer legislation intended to protect retail buyers); *Borzencki v. Estate of Stakum*, 195 Conn. 368, 383 (1985); *Heslin v. Connecticut Law Clinic of Trantolo & Trantolo*, 190 Conn. 510, 520 (1983) (remedial statute such as CUTPA entitled to liberal construction).

In addition, while no Connecticut court has addressed this question under the HSSA, several courts have reached illuminating decisions concerning similar language in the statute of frauds. General Statutes § 52-550 provides in relevant part: "No civil action may be maintained in the following cases unless the agreement . . . is made in writing and signed by the party . . . to be charged . . . (4) upon any agreement for the sale of real property or any interest in or concerning real property." In other words, just as the HSSA does not apply to contracts "pertaining to the sale or rental of real property," the statute of frauds applies to

contracts for the sale of real property and even to contracts with "any interest in or concerning real property." Not only do both statutes employ broad language to describe a contract's relationship to the sale of real property, but the language in the statute of frauds appears to be more expansive, applying to any contract that has any interest in or otherwise concerns real property.

Despite its apparent breadth, our Supreme Court has interpreted that language narrowly, holding that it does not even apply to listing agreements or broker contracts. See, e.g., *Location Realty, Inc. v. Colaccino*, 287 Conn. 706, 722 (2008) ("listing agreements are governed exclusively by § 20–325a [and] such contracts do not fall within our statute of frauds" [internal quotation marks omitted]); *Brazo v. Real Estate Comm'n*, 177 Conn. 515, 522 (1979) ("a contract employing a broker to sell land is not within the Statute of Frauds"). While there is now a separate statute applicable to broker contracts, this line of cases can be traced back to *Rathbun v. McLay*, 76 Conn. 308, 56 A. 511, 512 (1903), which makes clear that the nature of the thing in question, not the availability of a separate statute, is the important point. ("That the agency was created for the purchase of real estate for the plaintiffs was a mere incident, and of no consequence"); see also *Wetopsky v. New Haven Gas Light Co.*, 88 Conn. 1 (1914) (contract to dismantle and sell house on property not within statute of frauds).

If contracts to hire brokers and list real property for its sale are not "concerned with" or have "any interest in" the sale of real property, then the Agreement at issue here certainly does not "pertain to a sale of real property." And this makes sense: although contracts to hire brokers, list real estate for sale, or stage a home with furniture (chattel) owned by somebody else all are related to an *attempt* to sell real property, none of those endeavors involve the *actual sale* of real property – they instead involve the sale of goods or services, the precise

subject of the HSSA. Consequently, given the similarity of the language used in the two statutes, this Court should reverse the trial court and hold that the Agreement is controlled by the HSSA and that the Agreement, therefore, is not enforceable against Joan Frank

III. The Award Of Conversion Damages and Double Damages Is Legally Incorrect and Not Supported By The Record

A) Standard of Review

To the extent that this issue concerns the trial court's exercise of discretion in awarding damages, the "determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous.... A finding of fact is clearly erroneous when there is no evidence in the record to support it ... or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Citation omitted; internal quotation marks omitted.) *Keith E. Simpson Associates, Inc. v. Ross*, 125 Conn. App. 539, 542 (2010).

B) Argument

1. Double Recovery

First, there is no dispute that the plaintiff is claiming damages for the value of the furniture it placed in the Frank's home and for lost rental fees. (Tr. 3/27/13 at 56). Those amounts unquestionably were the basis for the plaintiff's claim for damages both in California and here in Connecticut. As calculated by the California court, the total amount was $259,746.10, which amount included a small attorney's fee. As calculated by Judge Tyma, the total amount was $283,106.45. Judge Tyma based his figures on amounts provided by plaintiff's president (Tr. 3/27/13 at 116), while the basis for the California court's calculation is unknown. So, the reason for the discrepancy in the two numbers is not apparent in the record, but there is no doubt that the two figures unquestionably represent the same loss.

It also is beyond dispute that a party may not recover twice for the same loss. "The rule precluding double recovery is a simple and time-honored maxim that [a] plaintiff may be

compensated only once for his just damages for the same injury ...." (Internal quotation marks omitted.) *Haynes v. Yale–New Haven Hospital*, 243 Conn. 17, 22 n.6 (1997). "Connecticut courts consistently have upheld and endorsed the principle that a litigant may recover just damages for the same loss only once. The social policy behind this concept is that it is a waste of society's economic resources to do more than compensate an injured party for a loss and, therefore, that the judicial machinery should not be engaged in shifting a loss in order to create such an economic waste." (Internal quotation marks omitted.) *Rowe v. Goulet*, 89 Conn. App. 836, 849 (2005), citing *Mack v. LaValley*, 55 Conn. App. 150, 169, cert. denied, 251 Conn. 928 (1999).

Here, after finding that George Frank properly was served with the California suit, the trial court entered an award of damages against George on count one of the underlying complaint for the full amount of the California default - $259,746.10. Then, after finding that Joan Frank had breached the Agreement, the trial court entered judgment for her on count two of the underlying complaint for $283,106.45. Because both amounts represent compensation for the same loss, they cannot stand together. To allow plaintiff to recover both amounts would constitute an unwarranted double recovery. Though plaintiff seemingly concedes that it cannot recover twice for the same loss, there is nothing in the record that makes clear that the plaintiff can only recover one of these amounts, and the defendants could face the prospect of further litigation if the plaintiff attempted to recover from both of these seemingly distinct judgments.

2. Contract Damages

Separately, this action is one for breach of contract. The plaintiff has made no claim for conversion or even for repossession of the furniture. The Agreement, in turn, provides that defendants will pay the plaintiff a monthly rental in exchange for the use of the furniture in their home. There is no requirement that the Agreement terminate by any time that is relevant to this litigation; there is no liquidated damages provision in the Agreement; and

there is no evidence that any written termination of the Agreement ever was sent by either party. Moreover, the only witness who testified on this issue, plaintiff's president, stated that he had no way of knowing what the current condition of the furniture is or of what use it might be to Meribear. (Tr. 3/27/13 at 58).

"The general rule in breach of contract cases is that the award of damages is designed to place the injured party, so far as can be done by money, in the same position as that which he would have been in had the contract been performed...." *Torosyan v. Boehringer Ingelheim Pharmaceuticals, Inc.,* 234 Conn. 1, 32 (1995). Damages for breach of contract are recoverable where: "(1) the damages were reasonably foreseeable by the breaching party at the time of contracting; (2) the breach is a substantial causal factor in the damages; and (3) the damages are shown with reasonable certainty." *Meadowbrook Ctr., Inc. v. Buchman*, 149 Conn. App. 177, 185 (2014). "In an action founded solely on breach of contract, ..., the recovery of the plaintiffs would have been limited to those damages the defendant had reason to foresee as the probable result of the breach at the time when the contract was made." (Citations omitted) *Neiditz v. Morton S. Fine & Associates, Inc.*, 199 Conn. 683, 689 n. 3 (1986).

In addition, it "is incumbent on the party asserting either direct or consequential damages to provide sufficient evidence to prove such damages." *Buchman*, 149 Conn. App. at 189, citing *Sullivan v. Thorndike*, 104 Conn. App. 297, 304 (2007), cert. denied, 285 Conn. 907, 908 (2008). "Generally, proof of damages should be established with reasonable certainty and not speculatively and problematically." (Internal quotation marks omitted.) *Buchman*, 149 Conn. App. at 189, citing *Leisure Resort Technology, Inc. v. Trading Cove Associates*, 277 Conn. 21, 35 (2006).

Here, the Agreement makes no provision for liquidated damages and defendants had no possible way to know, when the contract was signed, that plaintiff might at some point

decide to replace the furniture and charge defendants for the supposed value of the furniture in their home. There is no indication that any communication from the plaintiff, either at the time of contracting or after, made this possibility clear. Nor is there any indication in the contract that this might be the sort of claim arising thereunder. There finally is no evidence of the present value of the furniture, whether it may be rented to other parties or sold in mitigation of the plaintiff's claimed damages.

Ultimately, had defendants continued to pay the monthly rental charges, the Agreement, based on its terms, still would be in place. In that case, the defendants would have paid charges of $1,900 per month for approximately 36 months, for a total of $68,400. Or, had plaintiff recovered the furniture, it possibly would have rented it to some other customer for some portion of that time and recovered some amount nearing $68,400. Under either scenario, the plaintiff is entitled at most to $68,400, representing defendant's obligations under the contract. There is no contractual basis for turning $68,400 in lost rental profits into a $283,106.45 windfall. If the plaintiff wanted to make a claim for conversion, it could have. Because it did not, the damages in this case should be limited to damages flowing from the Agreement.

CONCLUSION

WHEREFORE, for the above stated reasons, the plaintiff urges this Court to reverse the judgment of the trial court and direct that judgment enter for the defendants.

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CERTIFICATION

Pursuant to Practice Book § 67-2, I hereby certify the following:

1. This brief and appendix comply with all provisions of this rule;

2. This brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law;

3. This brief and appendix are true copies of the brief and appendix that were submitted electronically pursuant to subsection (g) of this section;

4. A true electronic copy of this brief and appendix were delivered via e-mail to the counsel of record listed below on November 18, 2019, and said electronic copies redacted any personal identifying information where necessary to comply with the provisions of this rule;

5. In accord with Practice Book § 62-7, a copy of this brief and appendix was sent to each counsel of record, those trial judges who rendered a decision that is the subject of this appeal, and my client, on November 18, 2019, as further detailed below.

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